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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/789,131	02/27/2004	Matthew Donald Larson	022058.0101PTUS	6765

24283 7590 03/22/2007		EXAMINER
PATTON BOGGS		NGUYEN, PHILLIP H
1660 LINCOLN ST		
SUITE 2050	ART UNIT	PAPER NUMBER
DENVER, CO 80264	2191	

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	03/22/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

PTOL-90A (Rev. 10/06)

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *27 February 2004*.

2a)☐ This action is **FINAL**.　　2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-14* is/are pending in the application.

　　4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-14* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☒ The drawing(s) filed on *27 February 2004* is/are: a)☒ accepted or b)☐ objected to by the Examiner.

　　Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

　　Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

　　a)☐ All　b)☐ Some *　c)☐ None of:

　　1.☐ Certified copies of the priority documents have been received.

　　2.☐ Certified copies of the priority documents have been received in Application No. _____.

　　3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

　　* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)

2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)

3) ☐ Information Disclosure Statement(s) (PTO/SB/08)
　　Paper No(s)/Mail Date _____.

4) ☐ Interview Summary (PTO-413)
　　Paper No(s)/Mail Date. _____.

5) ☐ Notice of Informal Patent Application

6) ☐ Other: _____.

DETAILED ACTION

1.   This action is in response to the original filing of February 27, 2004. Claims 1-14

are pending and have been considered below.

Examiner's Note

2.   Applicant appears to be attempting to invoke 35 U.S.C. 112 6th paragraph in

claims 1-7 by using "means-plus-function" language. However, Examiner notes that the

only "means" for performing these cited functions in the specification appears to be

software. Since no other specific structural limitations are disclosed in the specification,

the claims **have not invoked 35 U.S.C. 112 6th paragraph**. Additional item to consider,

regarding claims 1, Examiner also notes that this claim recites sufficient structure, which

are "polling" and "data repository" for performing those functions. While the claim

passes the first of the three-prongs test used to determine invocation of paragraph 6th,

since it also recites sufficient structure within the claim itself to perform entirely recited

functions, the claim is **not in means-plus-function format**, even if the claim uses the

term "means". Therefore, **35 U.S.C. 1126th paragraph has not been invoked** when

considering these claims.

Claim Rejections - 35 USC § 101

3.   35 U.S.C. 101 reads as follows:

> Whoever invents or discovers any new and useful process, machine, manufacture, or composition of
> matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the
> conditions and requirements of this title.

4.   Claims 1-7 are rejected under 35 U.S.C. 101 because the claimed invention is
directed to non-statutory subject matter.

Claim 1 recites a system but it appears reasonable to interpret this system by
one of ordinary skill in the art as software, per se. Applicant's specification provides no
explicit and deliberate definition of the components ("polling means" and "data
repository means") that make up the system other than they could be software
components, which are directed to functional descriptive material, per se, and are
therefore non-statutory subject matter. Claims 2-7 directly or indirectly depend on claim
1, and therefore, have been addressed in connection with the rejection set forth to claim
1 above.

Claim Rejections - 35 USC § 112

5.   The following is a quotation of the first paragraph of 35 U.S.C. 112:

> The specification shall contain a written description of the invention, and of the manner and process of
> making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the
> art to which it pertains, or with which it is most nearly connected, to make and use the same and shall
> set forth the best mode contemplated by the inventor of carrying out his invention.

6.   Claim 2 and 9 are rejected under 35 U.S.C. 112, first paragraph, as failing to
comply with the written description requirement. The claim(s) contains subject matter
which was not described in the specification in such a way as to reasonably convey to
one skilled in the relevant art that the inventor(s), at the time the application was filed,
had possession of the claimed invention. Applicant recites "means for periodically
activating said polling means", Examiner could not find any support or written

description in the specification for this claim. Applicant is required to amend the claim to

recite material, which was described in the specification.

Claim Rejections - 35 USC § 102

7.   The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that

form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

8.   Claims 1-2, 6-7, 8-9, and 13-14 are rejected under 35 U.S.C. 102(e) as being

anticipated by Wilson et al. (United States Patent No.: US 6,714,976 B1).

As per claim 1:

Wilson discloses a system for monitoring operation of a software application that

executes on a processor, comprising:

-     polling means, connected to said software application, for polling said

software application to retrieve statistics data indicative of operation of said

software application ("**a controller 216 which interacts with the clients

212a-212n and the servers 214a-214n to monitor distributed applications

running (operating) on the various client and server system. Controller

216 reads (retrieves) and writes to a data repository 220**" col. 9, line 14-

18, **controller 216 reads (retrieves) data regarding of running (operating)
of distributed applications**); and

- data repository means for storing said retrieved statistics data ("**writes to a
data repository 220**" col. 9, line 18, **a data repository stores the data
regarding to running of distributed applications**).

As per claim 2:

Wilson discloses the system as in claim 1 above; and further discloses:

- means for periodically activating said polling means ("**a controller 216 which
interacts (activates) with the clients 212a-212n and the servers 214a-
214n...**" col. 9, line 14-15; "**data gathering may be performed on a periodic
basis**" col. 15, line 41-42, **clients and server contain distributed
applications periodically activate controller 216 to perform data
gathering**).

As per claim 6:

Wilson discloses the system as in claim 1 above; and further discloses:

- wherein said software application comprises a plurality of processes (**It is
inherent in Wilson's approach. One of ordinary skill in the art could
recognize that a distributed application contains plurality of processes
(functions) in order to fulfill its purposes**), said data repository means
comprises:

      o   means for storing statistics data from all of the processes presently executing within said software application ("**the data repository 220 in this embodiment is a database created and maintained to store various type of data**" col. 10, line 7-8).

As per claim 7:

Wilson discloses the system as in claim 1 above; and further discloses:

-   wherein said data repository means comprises:

      o   means for storing said retrieved statistics data individually in the data repository to thereby enable the separate analysis of the statistics data ("**the data repository 220 in this embodiment is a database created and maintained to store various type of data**" col. 10, line 7-8, **each type of data is stored individually**).

As per claims 8-9, and 13-14:

-   method claims, recite the same limitations as recited in claims 1-2 and 6-7 respectively, and therefore, have been addressed in connection with the rejection set forth to claims 1-2 and 6-7.

Claim Rejections - 35 USC § 103

9.   The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

10.   Claims 3-5 and 10-12 are rejected under 35 U.S.C. 103(a) as being unpatentable over Wilson et a. (United States Patent No.: US 6,714,976 B1), in view of Li et al. (United States Patent No.: US 7,143,392 B2).

<u>As per claim 3</u>:

Wilson discloses the system as in claim 1 above; and further discloses:

- wherein said software application comprises a plurality of processes (**It is inherent in Wilson's distributed application. One of ordinary skill in the art could recognize that a distributed application contains plurality of processes (functions) in order to fulfill its purposes**).

Wilson does not explicitly disclose:

- said polling means comprises:

   o means for determining which processes of said software application are presently executing within said software application.

However, Li discloses an analogous system that performs:

- means for determining which processes of said software application are presently executing within said software application ("**determined that the function "foo" consumes 3.2 milliseconds of processing time on processor A**" col. 16, line 65-67).

Therefore, it would have been obvious to one having an ordinary skill in the art at the time the invention was made to modify Wilson's approach to determine which processes (functions) of distributed application are presently executed. One of ordinary skill in the art would have been motivated to modify because it allows user to compare which function consumes more time (see Li col. 16, line 65-67 and col. 17, line 1-7).

As per claim 4:

Wilson and Li disclose the system as in claim 3 above; and Wilson further discloses:

- wherein said determining means comprises: means for retrieving statistics data directly from the process call stack of each of said processes (**"Because each agent is coupled into the client communication stack, it can monitor the loop back data that passes only through the communication stack**" col. 5, line 52-54).

As per claim 5:

Wilson and Li disclose the system as in claim 3 above; and Wilson further discloses:

- wherein said polling means comprises:
  - o means for monitoring all the processes embodied in the software application (**"a controller 216 which interacts with the clients 212a-212n and the servers 214a-214n to monitor distributed**

applications running (operating) on the various client and server

system" col. 9, line 14-17, this means, it monitors all processes in

the distributed applications).

As per claims 10-12:

- method claims, recite the same limitations as recited in claims 3-5,

  respectively, and therefore, have been addressed in connection with the

 rejection set forth to claims 3-5.

Conclusion

Any inquiry concerning this communication or earlier communications from the

examiner should be directed to Phillip H. Nguyen whose telephone number is (571)

270-1070. The examiner can normally be reached on Monday - Thursday 10:00 AM -

3:00 PM EST.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's

supervisor, Wei Y. Zhen can be reached on (571) 272-3708. The fax phone number for

the organization where this application or proceeding is assigned is 571-273-8300.

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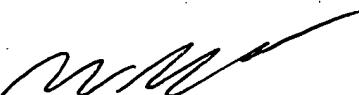
WEI ZHEN
SUPERVISORY PATENT EXAMINER